

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SCOTT SERVICE CORPORATION

and

Case No. 6-CA-28475

THOMAS W. RICE, An Individual

David Shepley, Esq., for the General Counsel.
James Q. Harty, Esq. (Plummer, Beaman, & Dewalt),
for the Respondent.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to a charge filed by Thomas Rice on September 17, 1996, and amended on January 30, 1997, the Regional Director for Region 6 of the National Labor Relations Board (the Board) issued a complaint on January 30, 1997, alleging that Scott Service Corporation (the Respondent) had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by terminating and thereafter refusing to re-employ Rice for complaining of, and refusing to work under, unsafe working conditions. By answer dated February 4, 1997, the Respondent denied the commission of any unfair labor practices. A hearing on the above allegation was held before me on March 20, 1997, in Pittsburgh, Pennsylvania, at which all parties were afforded full opportunity to appear and to present, call, and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record.

On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering posthearing briefs filed by the General Counsel and the Respondent, I make the following¹

¹ The General Counsel's brief is referenced herein as "GCB" and the Respondent's brief as "RB" followed by the page number. Reference to testimony shall be noted as "Tr." followed by the page number, and exhibits shall be referred to as "GCX" for a General Counsel exhibit, and "RX" for a Respondent exhibit.

The Respondent appended to its posthearing brief a chart entitled "METAR Key to Aviation Routine Weather Report," presumably prepared by the U.S. Department of Commerce, NOAA National Weather Service, to show what the weather conditions were like on September 3, 1996, in Suffolk, Virginia on the day in question here. The chart, however, was not produced at the hearing and consequently does not constitute part of the record. Accordingly, and as the General Counsel was not given an opportunity to contest its accuracy or relevancy, I have given no consideration to the chart in rendering this decision.

Findings of Fact

I. Jurisdiction

5 The Respondent, a corporation with an office and place of business in Scottsdale, Pennsylvania, is a contractor engaged in the business of clearing and maintaining utility line easements for various utilities in the eastern United States, including Appalachian Power Company. During the 12-month period ending August 31, 1996,² a representative period, the Respondent, in the course and conduct of its above-described business operations, provided
10 services valued in excess of \$50,000 to Appalachian Power Company, an enterprise doing business in Virginia and West Virginia and directly engaged in interstate commerce. The complaint alleges, the Respondent admits, and I find, that Scott Service Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Factual Background

20 The Respondent's business, as noted, consists largely of clearing of right-of-way corridors for utilities such as Virginia Power, Baltimore Gas & Electric, Philadelphia Electric, North Carolina Power, etc. Its president, Randy Lemin, characterized the work as seasonal, noting that the number of employees will vary from 250 to 350. Typically, the work performed by its employees involves clearing 60-250 ft. wide areas of grass, brush, and other growth, and trimming trees around power lines. To do so, the Respondent first sends in a mechanical crew
25 to remove as much of the growth as possible using special cutting machinery and tractor-type equipment, after which handcutting crews averaging sixteen in number are sent in to remove what the mechanical crew may have missed. Where the jobsite is inaccessible to the mechanical crew and equipment, handcutting crews will perform the work exclusively.

30 The Respondent maintains different job classifications that include groundman, timber cutter, and operator. Lemin testified that regardless of an employee's particular classification, all employees, including job foremen, are required to do whatever is needed to get the job done. Thus, while a timber cutter's primary function is to climb and trim trees, he is also required to help the groundmen with the clearing of brush. It is undisputed that the work
35 involved is extremely difficult and hazardous, and that the jobsites range from very mountainous to very swampy. Respondent's chief foreman, Mike Deal, testified credibly and without contradiction, that when employees are first hired they are made aware of the dangers and difficulty of the work and are fully briefed on what to expect.³ Employees are provided with safety gear to protect against chainsaw injuries, and rubber waders to keep them dry in the
40 swampy areas. Employees are also trained in the administration of first aid (Tr. 48).

Rice began working for Respondent as a timber cutter in 1994, and worked through the

² All dates are in 1996, unless otherwise indicated.

45 ³ Deal is responsible for hiring and firing individuals on his crew (Tr. 145-146). Deal credibly testified that he specifically told two new employees, Wayne and Brian Hess, that the Dismal Swamp work site, in Suffolk, Virginia they were going to on September 3, was wet, muddy, and swampy, and that they stated they wanted to work and would give it a try (Tr. 177). Rice's testimony that Deal explained the nature of the job to the Hess brothers corroborates Deal's claim that employees are made aware of the difficult nature of the job before being hired (Tr. 53).

first half of 1995, after which he remained out of work for some five to six months due to an auto accident. In February 1996, he returned to work and remained employed until September 3. During his most recent employment, Rice worked as part of a six-man crew headed by Deal.

5 On September 3, the Respondent began a clearing project for Virginia Power Company in the Dismal Swamp, in Suffolk, Virginia that was scheduled to last two weeks. Two work crews led by Deal and a second foreman John Snyder were assigned to the jobsite. Deal's crew included employees Rice, brothers Jason and Kevin Rosenberger,⁴ Marvin Ditmore, Samuel Sisler, Scott Squires, Keith Tomblin, Robert Fike, and the Hess brothers.⁵ After several
10 hours drive from their home base in Pennsylvania, the crews arrived at the Dismal Swamp at 7:00 AM. As the actual worksite was inaccessible to the trucks, the crews walked the three-fourths of a mile to the clearing site carrying chainsaws and other equipment.

15 Although he had never before been to the Dismal Swamp, Rice had worked other swamp sites for Respondent. His testimony reflects that he had a general dislike for working in the swamp. In 1994, for example, after his first job in a swamp, Rice told Deal that he "wasn't cutting any more swamps" (Tr. 75).

20 Rice claims that the conditions at the Dismal Swamp on September 3, were so bad that he and others agreed to walk off the job after working only a few hours. His description of the events of that day are as follows: On arriving at the location, employees had to make the trek to the actual clearing site on foot because the trucks were unable to proceed further. Consequently, both crews walked from 1 to 1½ hours carrying their chainsaws and other equipment through mostly knee-high water, and at times waste deep, to reach the site that was
25 to be cleared. It was, however, common practice for employees to be dropped off some distance from the jobsite and walk the rest of the way (Tr. 47).

Rice claims that on two separate occasions that day, he and other employees discussed among themselves the adverse working conditions of the Dismal Swamp as well as some
30 safety concerns associated with the work. The first occasion purportedly took place as they walked out to the site. According to Rice, as he and other employees walked they complained about the distance and the problem with mosquitoes, and how it "wasn't worth going in to the swamps to work" because "it was too far."⁶ Asked by the General Counsel if there was "any degree of difficulty in walking the distance from the trucks to the work site," Rice answered,
35 "No, there was no difficulty" (Tr. 16). Rice claims he and other employees also talked about what might happen if someone were to get hurt in the swamp. Asked by the General Counsel to describe the adverse working conditions he and his co-workers encountered that day, Rice offered the following response: "Well, just like I said, you know, it's about the same thing, you know, the conditions of the water, you know, it was real hot out..., the mosquitoes were
40 constantly biting you" (Tr. 20-21). Rice summarized the working conditions by stating it just "wasn't worth working in the swamps and a couple of other things." Prodded by me to explain

⁴ As only Kevin Rosenberger figures significantly in this proceeding, all references herein to Rosenberger refer to Kevin only, unless otherwise indicated.

45 ⁵ Ditmore was the more senior of the employees, having worked for Respondent for four years. Next in line in terms of seniority was Rice (3 years), followed by Sisler (2½-3 years), and then Rosenberger (2 years). Employees Fike, Tomblin, and the Hess brothers were new to the job as of September 3 (Tr. 174-176).

⁶ In an affidavit given to the Board, Rice apparently stated that the walk to the work site was approximately two miles long. On cross-examination, however, he admitted not knowing how far the site was from the trucks (Tr. 46).

what he meant by a “couple of other things,” Rice added: “The water was deep, and you were sinking in the water; that’s all we was talking about, and the brush was a little thick there, you know, it was hot out, the mosquitoes biting; it was pretty aggravating working in the swamp” (Tr. 22). He admitted, however, that working in swamps and contending with mosquitoes was part of the job (Tr. 46). Rice recalled that at one swamp site he previously worked at, the water was so deep that employees were transported by Lemin to and from the worksite in a pontoon boat. He claims, however, that the water depth then was not as bad as it was at the Dismal Swamp (Tr. 59).

The second alleged group discussion occurred after employees had been working for several hours, and after Rosenberger had walked off without telling anyone he was leaving or giving a reason. According to Rice, after Rosenberger walked off, he and the other employees continued working, but that during a break agreement was reached by several employees, including Rice, to walk off. His testimony as to what was said during this break is ambiguous and confusing. On direct examination, for example, Rice claims he and the others discussed the working conditions at the swamp, and in particular the heat and long walk to the site, and at that point agreed to walk off the job. However, asked on cross-examination about his involvement in the discussion, Rice initially stated, “I wasn’t really saying nothing. I was just telling them, you know, I was thinking about walking out, and they told me the same thing before that. And that’s about all we talked about.” Rice subsequently added that he had informed others that he was walking out because “it was hot, it was too far of a walk.” Yet, he conceded that he had worked in hotter weather before, and had also worked during the cold winter months. Rice also was not sure how hot it was on September 3, and suggested the temperature was somewhere “in the 80’s, maybe a little less, maybe a little more.” Asked if he simply did not like the weather on that particular day, Rice stated, “it wasn’t just the temperature, it was just the conditions of the place, ...it was just unreal,” and claimed he had never worked in worse conditions (Tr. 58).

After he and several other of the newer employees purportedly agreed to walk off, Rice claims he went to tell Deal he was leaving but changed his mind after considering his financial situation. Despite changing his mind, he went over to Deal to tell him the others were leaving. Deal purportedly expressed no concern about the employees’ departure but asked Rice what he intended to do. Rice responded he was returning to work and in fact did so. However, one-half hour later, Rice purportedly became “so aggravated with the job” that he decided to leave. He claims he again went over to Deal and told him he was leaving, but was not quitting his job. Thus, on direct examination he testified as follows: “Yeah, I told Mike, I said I wasn’t quitting. I said I wasn’t quitting. I made sure he understood that. I told him I was [sic] quitting,⁷ that when we went back to cutting timber on another job, besides the swamp, I’d go back to work” (Tr. 25). His testimony on cross-examination (Tr. 74) was slightly different as shown by the following exchange between Rice and Respondent’s counsel:

Q: But you didn’t tell him then that you would come back to work the next day?

A: No, I told him that I’d go back to cutting timber like I was hired as a first class timber cutter.

Q: You told him you were giving up this job is what you’re saying?

A: Yes, sir.

Q: But now this one, no more of this?

⁷ The record erroneously shows Rice stating that he “was quitting” when in fact his testimony is that he said he was not quitting. The record is hereby corrected to reflect his true testimony.

A. No, sir.

Q: Didn't like it?

A: No, I didn't like it.

5 Deal, according to Rice, stated that he did not blame Rice for walking off, and that he too would not be working there if he did not have a family to support (Tr. 24). Asked if he told Deal why he was walking off, Rice replied, "I just told him about a couple of conditions, about the mosquitoes and it was hot out." Rice made no mention of having expressed any safety concerns to Deal as he walked off. Deal, according to Rice, did not reprimand him at that point
10 for walking off the job, or tell him he would be disciplined or fired for doing so.

After leaving the worksite, Rice walked back to the trucks where Rosenberger and another individual identified only as "Jack" were waiting.⁸ The other employees who walked before Rice apparently decided to walk back to the motel where they were staying, a distance
15 of approximately 20 miles according to Rice. Those who remained on the job continued working until about 5:00 PM, after which they returned to the trucks and drove back to the motel.⁹ On arriving at the motel, Rice phoned his girlfriend to come pick him up. Rice claims that at some point later that evening, as he was handing Deal the keys to one of the trucks, Deal asked him what his plans were. Rice purportedly responded that he and the others who
20 walked off were going home.

Rice had no further communication with Respondent until Sunday, September 8. On that day, employee Squires, who had walked off the job on September 3, called Rice and told him he was returning to work and asked if Rice was going back. Rice told Squires no one had
25 called him about returning to work. Later that day,¹⁰ Rice called Deal to inquire about returning to work but was purportedly told by Deal that he could not return because Lemin had instructed him to fire Rice. Rice asked why he was being fired, and explained that his conduct was no different than that of the Hess brothers and the other employees who walked off the job, and that given his seniority over the other employees he did not understand why they would fire him
30 and take all the other guys back. Rice claims Deal did not respond to his query (Tr. 27; 72).

Deal did not dispute the specifics of the walkout, but not surprisingly offers a different

⁸ Jack, a new employee, chose not to work when he arrived at the Dismal Swamp site and remained in the truck. The General Counsel suggests that Jack's refusal to work is evidence
35 that the working conditions at the swamp were indeed poor. The claim is without merit. The evidence indicates only that Jack may have been overweight and that it was his lack of physical stamina, not any unsafe or poor working conditions, which caused him to change his mind about working that day (Tr. 180). Indeed, he could not have known if the conditions were
40 tolerable or intolerable as he never made the trip to the jobsite.

⁹ The Daily/Weekly Report containing the number of hours worked by employees that day shows that those who remained on the job worked a ten hour day or until approximately 5:00 PM. Relying on Rice's testimony, the General Counsel claims that the other employees returned at 3:30 PM, and not 5:00 PM. However, Rice, who readily admitted he was not
45 wearing a watch, appeared uncertain about the time, stating, "Everybody probably came out maybe, its like probably 3 o'clock, 3:30" (Tr. 62). His rather dubious testimony in this regard, which I reject as not credible, is, as noted, contradicted by the more credible time sheet reflecting that those who remained worked a full ten-hour day (RX-2A).

¹⁰ Rice was not sure when on Sunday he called Deal, stating at first that he called on Sunday night, but subsequently claiming that he could not say what time it was, but that it was "earlier in the day" (Tr. 72).

version of what he and Rice discussed at the jobsite, and during their September 8, phone conversation. Initially, Deal noted that the walkout by employees was not unusual, explaining that oftentimes individuals would accept employment with Respondent only to realize on arriving at a particular jobsite that the work was more difficult than anticipated, causing them to quit soon after arriving. Thus, he testified that on seeing the new employees huddled together at the Dismal Swamp site, he surmised they might be planning to walk off as others had done in the past (Tr. 184). He recalled that Rosenberger was the first to walk off the job, followed a short while later by the Hess brothers, Tomblin, and Fike. None, however, told him they were leaving. Deal claims that at no time that day did any employee come to him to complain about conditions at the swamp.

Deal recalls having a conversation with Rice at the jobsite at about the time the four employees walked off, but could only recall that he and Rice discussed trying to find a shorter route out of the swamp and back to the trucks (Tr. 216-217). Strangely enough, Deal was never asked to confirm or deny Rice's claim about a second conversation during which Rice told Deal he was leaving and the reasons therefore. While the lack of corroboration by Deal does not mean that this second conversation did not occur, Rice's overall lack of credibility as a witness (discussed below) leads me to question whether such a second conversation in fact took place.¹¹ Rice's statement at one point in his testimony, that "[t]he only conversation [he and Deal] had in the swamp [occurred] when I told him I was walking off" (Tr. 61), suggests that only one conversation between the two occurred that day.

Deal agrees with Rice that at the end of the day, after those who remained on the job returned to the trucks, they drove back to the motel which he estimated as being only 2½-3 miles away, not the 20 miles claimed by Rice. At the motel, the Hess brothers and Tomblin retrieved their saws from the back of the truck, and informed Deal they were leaving. Deal sought to convince them to stay and work the next day, indicating that by walking off the job they would be treated as having voluntarily terminated their employment.¹² The employees declined Deal's offer to remain on the job claiming that they might have been willing to give it a try had they had more experience doing that sort of work. Deal then suggested they give him a call the following weekend to see what other work might be available. Employee Fike, however, told Deal he had no interest in returning. The record does not reflect why he decided to walk off the job.

Later that evening, Deal notified Lemin by phone of the walkout and told him he was treating the employees as having voluntarily quit their employment (Tr. 188). Deal denies that Lemin instructed him on how to handle the situation. He further credibly denied speaking to

¹¹ The General Counsel on brief appears somewhat confused by the testimony regarding the conversation between Rice and Deal. For example, at p. 17 (fn. 23) of the General Counsel's brief, the latter asserts that when Deal testified he did not recall what he and Rice talked about, Deal was referring to Rice's second alleged conversation that presumably occurred when Rice walked off the job. However, Deal's above answer came in response to the General Counsel's question as to what Deal recalled was said between him and Rice soon after the group of employees walked off. The focus of the General Counsel's question therefore had nothing to do with any conversation the two may have had when Rice walked off one-half hour later. This was made clear by the following question from the General Counsel to Deal: "I just want to make absolutely sure, Mr. Deal, that's the only thing you recall from your conversation with Mr. Rice after he came over to you right after the group walked off" (Tr. 217).

¹² Deal testified that he probably had told employees that anybody who walks off a job is viewed as having quit.

Rice at the motel that evening, noting that he was not even certain if Rice had remained at the motel. Deal subsequently prepared "separation" notices listing Rice, Rosenberger, and others as having quit their employment because they disliked the work (RX-4).¹³ As to Rice and Rosenberger, Deal admits he never ascertained from them the reason for their departure and simply assumed they left because they did not like the work. The Hess brothers, however, did tell Deal they quit because they did not like the work.

As noted, Deal's version of his September 8, conversation with Rice differs in material respect from Rice's account. Initially, the General Counsel's assertion on brief (GCB: 17) that Deal "could recall almost nothing" of that conversation is simply wrong, for Deal provided a more detailed and, in my view, more credible account than did Rice. Thus, Deal testified that when Rice called to ask where he would be working, he told Rice that he had quit when he walked off the job, and that he (Deal) did not want him back because Rice had missed two weeks of work prior to September 3.¹⁴ When Rice protested that he had not quit, Deal repeated that anybody who walks off the job is deemed to have resigned. According to Deal, Rice at that point mentioned that he was going to contact an uncle who worked as a supervisor with Pennline Service, an affiliate of Respondent, to see about getting his job back.

The General Counsel's suggestion, that Deal's failure to corroborate Rice's version of the conversation should somehow be held against Deal; is rather disingenuous, for Deal could hardly be expected to recall something that, by his account, simply did not occur, such as Rice's claim to having been told by Deal that Lemin wanted Rice fired. The fact that Deal did not expressly deny Rice's latter assertion is of no consequence, for by proffering his very different version of the September 8, conversation, Deal implicitly refuted Rice's assertions. Deal admits he did not tell Rice on September 3, that walking off the job was considered a quit, but claims that given his three year employment tenure with Respondent, Rice would have known of the policy (Tr. 211). While denying ever receiving a copy of Respondent's written work rules, Rice did not deny having knowledge of the "quit" policy prior to September 3 (Tr. 35).

¹³ The General Counsel contends that the separation notice prepared on Rice (RX-4A) was deliberately altered by Deal, arguing in support thereof that the notice was initially dated September 8, but was changed to September 3, by Deal so as to create the impression it was prepared the day Rice walked off, e.g., September 3, and not on September 8, when Deal informed Rice he would not be rehired (GCB: 18, fn. 25). The General Counsel's assertion is pure speculation and lacks evidentiary support. While a review of the notice does suggest that the "3" portion of the date was written over something else, there is no evidence to indicate that the number "8" was in place before the "3" was written in. The General Counsel is also wrong in his assertion that "Deal refused to admit...that there was a mark on RX-4A" beneath the "3" (GCB: 18), for a review of his testimony reveals that Deal admitted that some type of mark might have been placed there before the number "3" was entered, but explained that he might have simply made a mistake and corrected it with the "3" (Tr. 213). At no time did he admit having written an "8", nor was I able to discern the number "8" following close examination of the document.

¹⁴ The record reflects that during the week of August 12, Rice did not work because he overslept and missed his ride with Deal to a jobsite. The following week, beginning August 19, Rice was scheduled to go on a pre-approved vacation. Rice testified that when he missed his ride on August 12, Deal did not object to his taking his vacation the following week, and simply told him to call him when he got back from the beach. Rice did work for Respondent the week beginning August 26.

Lemin provided brief and largely uncontradicted testimony regarding the nature of his business. According to Lemin, the Dismal Swamp was not the most difficult or hazardous worksite encountered by employees. He disputed Rice's claim, on the basis of his own personal knowledge, that the swamp alluded to by Rice, wherein employees were taken out by pontoon boat, was more difficult than the Dismal Swamp site. He further noted that some of the mountainous jobsites are as difficult, if not more so, than working in the swamp, because the trip to the mountainous jobsites would often involve a walk of up to 2½ miles (Tr. 141). Lemin confirmed having spoken with Deal on September 3, about the walkout, stating that Deal only told him that several guys had walked off the job and that he was treating them as "quits." He testified that he gave Deal no instructions on how to handle the situation, nor did he ask which of the employees had walked off. Lemin further confirms having spoken with Deal when the latter "got home that weekend" (e.g., September 7-8), during which Deal told him several of the newer employees wanted to work and were willing to give the job another try, and asked Lemin what he thought about it. Lemin told Deal that it was up to him, that Deal should go ahead and take the employees back only if he thought it was worth it (Tr. 148-149). Finally, Lemin corroborated Deal's assertion that employees who walk off a job are treated as quits (Tr. 157).

Called as a witness for the General Counsel, Rosenberger described the working conditions on September 3, as "hot, wet, and full of mosquitoes." As to what he may have heard employees discussing, Rosenberger testified only that as they were walking out to the jobsite, employees complained about the weather being too hot, and that the work "wasn't worth it." Rosenberger also provided some vague testimony regarding what occurred after the employees started working. He stated, for example, that he observed employees talking together in a group, and that at one point he went to the group and told them he was quitting because it was hot and the mosquitoes were bothering him (Tr. 91-92). Asked if anyone in the group had commented on the working conditions, Rosenberger vaguely responded, "Yeah, everybody was saying stuff like that the whole time we was there." As to whether he heard Rice complaining aloud about the poor working conditions, Rice expressed uncertainty and could only speculate that Rice "probably said something but I can't remember that far away" (Tr. 92).

Rosenberger testified he too complained about the hot weather and the mosquitoes, and was of the view that the job was unsafe because if someone was injured on the job it would be difficult to get him to a hospital. There is no indication, however, that he discussed his safety concerns with Rice or other employees, or that he heard such safety issues being discussed. Except for an occasional splinter, Rosenberger could not recall any employee ever being injured on the job (Tr. 120). As to why he walked off the job, Rosenberger claims he quit because it was hot and the mosquitoes were bothering him, and because he was "fed up with everything." Like Rice, Rosenberger admits that mosquitoes are a constant presence at every worksite and are simply an undesirable part of the job, and admitted having worked at other swamps where the water was chest-deep as it was at the Dismal Swamp, and that Respondent provided employees with the same safety and work gear at all locations. According to Rosenberger, conditions at Respondent's various worksites are basically the same. He claims he has never complained to his supervisor in the past because "it's just the way it is" (Tr. 103). Nevertheless, on September 3, after working several hours, Rosenberger walked off the job. His testimony on whether he notified Deal of his decision is conflicting, for while on direct examination he stated he walked out by himself and "never seen nobody," on cross-examination he claimed he saw Deal on the way out and told him, "I quit" (Tr. 89, 107). Yet, further on in his cross-examination, he stated, "Well, I never went to him. He was up ahead of me, and I just more or less just told him, you know, I'll see you" (Tr. 123). He seemed even more confused on redirect examination, for after claiming to being "pretty sure" he spoke with Deal before leaving the area, he conceded he simply could not remember speaking to Deal at all (Tr. 124-125). Rosenberger further testified that he had walked off previous jobs both before

and after the September 3, Dismal Swamp work, and was never disciplined for doing so. Deal contradicts Rosenberger in this regard and claims this was the first time the latter had walked off one of Respondent's jobs while under his supervision.¹⁵

5 About an hour or so after he walked out and returned to the trucks, Rosenberger claims four other employees walked off and appeared at the truck site, and they in turn were followed a short while later by Rice. Rosenberger further claims that Rice sat with him and Jack in the same truck for a short while, after which Rice went to the other truck and fell asleep. Rice admits being in the same truck with Rosenberger and Jack but denied falling asleep. Once the
10 other employees who remained on the job returned, they all drove back to the motel. The record reflects that Rosenberger subsequently went back to work for Respondent under essentially the same conditions as were present at the Dismal Swamp jobsite.

15 On September 4, the day after the walkout, Deal did not return to the Dismal Swamp jobsite but went on to another project in Virginia. However, on September 15, he returned to the Dismal Swamp to complete the job. The General Counsel, on brief (p. 10), suggests that Respondent's decision not to continue working at the Dismal Swamp site after the walkout is tantamount to an admission that the Dismal Swamp site was unsafe. There is, however, a
20 more plausible and credible explanation for Deal's decision not to continue working at that particular site. The record, for example, reflects that during inclement weather, e.g., rain, the Respondent does not allow employees to continue working at the affected site. In this regard, Lemin testified, credibly and without contradiction, that the week following the September 3, walkout, it rained quite a bit for 4-5 days, and that as a result, employees were pulled off the Dismal Swamp job and sent elsewhere (Tr. 147).¹⁶ Rosenberger corroborated Lemin's above
25 testimony by testifying that he heard it had rained at the Dismal swamp jobsite during the period in question, and stating further that when it rains too much, the Respondent pulls its men off the job until the rain stops and the terrain dries out (Tr. 116). In light of these facts, I find that Respondent's decision to temporarily discontinue working at the Dismal Swamp jobsite on September 4, was due solely to excessive rain, and not to any alleged unsafe condition that the
30 General Counsel claims existed on September 3.

B. Discussion and Findings

35 The sole issue here is whether Rice was unlawfully discharged on September 8, for walking off the Dismal Swamp job on September 3, in protest over what the complaint alleges and the General Counsel contends were unsafe working conditions at the jobsite, or whether, as argued by the Respondent, Rice simply quit his employ for personal reasons, e.g., a dislike for working in the swamp. Resolution of this issue turns in large measure on the credibility of the various witnesses, a matter which I now address.

1. Credibility Resolutions

The General Counsel, as noted, presented two witnesses, Rice and Rosenberger, while

45 ¹⁵ The General Counsel apparently accepts Deal's claim over Rosenberger's contrary assertion for he avers on brief that Rosenberger had never walked off a job prior September 3 (RB: 10; p. 7, fn. 11).

¹⁶ Although Lemin was not at the jobsite and consequently would not have had firsthand knowledge of the weather conditions, Deal, who receives his job assignments from Lemin, would obviously have informed Lemin of the situation, causing Lemin to reassign Deal and the remaining workers to the other Virginia jobsite.

the Respondent countered with Deal and Lemin. From a demeanor standpoint, the latter were more convincing and struck me as having testified in a honest, straightforward, and truthful manner. Rice and Rosenberger, on the other hand, were at times inconsistent and self-contradictory, and were simply not very credible. Rosenberger, for example, seemed confused and unsure of himself, and had difficulty recalling events of September 3, even when aided by his own affidavit. Inconsistencies in his testimony, as when provided conflicting accounts on whether he spoke with Deal as he walked off the job, lead one to doubt his overall veracity.

While seemingly more composed than Rosenberger on the witness stand, Rice was equally as unconvincing. Rice, for example, had difficulty keeping his story straight as to what precisely it was about the Dismal Swamp site that caused him to walk off the job, claiming on one occasion that it was the heat, mosquitoes, and deep water, while asserting on another that it was the long trek from the trucks to the work site that he found objectionable (Tr. 59-60). Further, his self-serving claim that he complained about, and discussed, the above conditions with other employees was not corroborated by Rosenberger, who only recalled that Rice “probably said something but I can’t remember that far away.”

Rice was also prone to exaggerating, as when he asserted that the distance from the work site to the motel was 20 miles, a claim refuted by Deal who more credibly stated the motel was less than 3 miles away. I find it highly unlikely that the employees who walked off the job and returned to the motel after working several hours in what has been described by the General Counsel’s witnesses as difficult conditions and stifling heat, would have walked 20 miles to the motel. Rather, the more plausible scenario is that the employees, knowing the hotel was only 3 miles away, chose to walk the relatively shorter distance rather than wait in the trucks until the Deal and the other employees returned at the end of the workday. Rice, as noted, further exaggerated in his affidavit to the Board the distance from the trucks to the actual worksite as being two miles, conceding instead during cross-examination that he did not know what the distance was, and further admitting, implicitly, that the distance was closer to three-fourths of a mile (Tr. 59). I am convinced that Rice’s exaggeration was deliberate, intended in my view to bolster his assertion as to the difficult conditions at the swamp. Rice’s proclivity to deceive either through exaggeration or outright lies was further made apparent when he initially denied ever having received a disciplinary write-up for failing to report for work during the week of August 12. Only after the General Counsel presented him with the write-up and asked if he wished to amend his answer did Rice reluctantly admit that he indeed was given a write-up (Tr. 33)..

Deal, as found above, was more believable than either Rice or Rosenberger. The General Counsel attacks Deal’s credibility by pointing to what he claims was Deal’s inability to recall what Rice may have said to him as he walked off the job on September 3, what he told Lemin on September 3, and his inability to “recall almost nothing” of his September 8, conversation with Rice. As to his conversation with Lemin, Deal, to be sure, did state at one point during cross-examination that he did not remember what he had told Lemin (Tr. 188). Deal’s comment, in my view, was simply an assertion that he did not recall word for word what he and Lemin may have discussed. He did, however, recall the gist of the conversation and so related it to the General Counsel on cross-examination as he had on direct examination. Regarding his September 8, conversation with Rice, Deal, as previously found, gave a full account of his version of that conversation. His failure to agree with Rice as to what was said hardly constitutes a lapse in memory.

Although at first blush there would appear to be an inconsistency between Deal and Rice as to what was said between the two soon after the four employees walked off, their versions are indeed reconcilable. Thus, Rice’s assertion that he told Deal the other employees

had decided to leave accords, in my view, with Deal's claim that he and Rice discussed trying finding a shorter way out of the swamp, presumably so as to make the employees' exit from the swamp less difficult. In sum, despite any minor shortcomings that may be found in his testimony, I find that Deal was, contrary to the General Counsel's claim, a very credible witness. Consequently, where a conflict in testimony exists between Rice and Rosenberger on the one hand, and Deal on the other, I have accepted the latter's version of events as true.

The General Counsel also attacks Lemin's credibility, claiming it is just not reasonable to believe that so little attention was given to the walkout during the two phone conversations Lemin had with Deal on September 3, and 8, or that Rice's status would not have been discussed (RB: 17). I disagree. Deal, as noted, credibly testified that walkouts by employees was a common occurrence. In all likelihood, therefore, Lemin and Deal, who controls the hiring and firing, must have had this same conversation on several occasions, leading me to believe, as testified to by Lemin, that the matter did not overly concern him, and that he simply left it to Deal to solve the problem, as he presumably had done in the past. Thus, there would have been no reason to discuss Rice's status in particular, as he, like the others who walked off, were simply viewed as having quit.

There is an even more logical explanation for why Deal and Lemin would not have mentioned Rice in their second conversation, the focus of which was whether or not to rehire the four employees who asked Deal for another opportunity to do the work (Tr. 149). By Rice's own admission, he did not ask to return to work until Sunday, September 8. The Deal-Lemin phone conversation in which the reinstatement of the other four employees was discussed in all likelihood took place either late Friday, September 6, or sometime Saturday, September 7.¹⁷ As Rice, unlike the newer employees, had not requested to be returned to work, there would have been no reason for Deal and Lemin to discuss Rice during their conversation about the reinstatement of the other employees. In any event, I am convinced Lemin testified in a honest and truthful manner, and find, contrary to the General Counsel's contention, no basis for rejecting his testimony.

In sum, I conclude that neither Rice's nor Rosenberger's testimony is entitled to much weight, and any conflict between their testimony and that furnished by Deal and Lemin is resolved in favor of the latter. With this in mind, I turn next to the question of whether, as alleged in the complaint and argued by the General Counsel on brief, Rice was unlawfully discharged on September 8, for walking off the Dismal Swamp job on September 3, presumably in protest over "exceedingly unsafe and onerous" working conditions at the site.

2. The Section 8(a)(1) allegation

Section 7 of the Act guarantees to employees, among other things, the right to engage in concerted activities... for the purpose of mutual aid or protection, and an employer's interference with that right is a violation of Section 8(a)(1) of the Act.¹⁸ To qualify as a "concerted" activity, an employee's conduct must have been engaged in with or on behalf of other employees, and not solely on behalf of the employee himself. *Meyers Industries*, 281 NLRB 882, 885 (1986). Under the Board's definition of "concerted" activity, a mere conversation between two employees will not, without more, meet the Board's standard of

¹⁷ Lemin testified this conversation occurred soon after Deal returned from Virginia. It is reasonable to assume, given that the ride from Virginia to Pennsylvania is only several hours long, that Deal would have called him late Friday, or the next day, Saturday.

¹⁸ See, 29 U.S.C. §157 and §158(a)(1).

“concertedness.” Rather, to be deemed “concerted,” it must at the very least appear that such conduct was engaged in with the object of initiating or inducing or preparing for group action, or had some relation to group action in the interest of the employees. *Mushroom Transportation Company v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964).¹⁹ Under *Meyers*, once an activity is found to be concerted, the Board will find a Section 8(a)(1) violation if it can be shown that the employer knew or had reason to know that the employee was engaged in the concerted activity, that the activity was protected under the Act, and that the employer took adverse action against the employee in response to the latter’s protected concerted activity.

Applying the above principles to the instant case, I find that Rice was not engaged in concerted activity when he walked off the job on September 3. The only evidence pointing to some form of group action by Rice and other employees came from Rice himself. Thus, he testified that safety concerns and adverse working conditions at the jobsite were discussed on two separate occasions that day. Rice’s claim in this regard lacks evidentiary support. Rice, for example, was not corroborated by Rosenberger, who apparently was called for that precise purpose. Thus, not only was Rosenberger himself an unreliable witness, but he never came close to supporting Rice’s story.

Rosenberger testified only that as employees walked out to the jobsite, he heard them complaining about the hot weather and the mosquitoes. He makes no claim in his testimony, however, to having observed employees grouped together discussing their working conditions or planning to take some form of action. Nor for that matter did he recall Rice even complaining about the working conditions, testifying only that Rice “probably said something, but I don’t remember that far away.” As to the second group gathering mentioned by Rice as having occurred during an employee break, Rosenberger could not possibly have corroborated him for by Rice’s own account, Rosenberger had walked off the job before this alleged gathering took place. Thus, the most that can be gleaned from Rosenberger’s testimony is that some general complaining went on. I find nothing in his testimony, however, to suggest that this general griping ever blossomed into group action, or that Rice himself participated in any group discussion. I am not unmindful of Deal’s own testimony that he observed the newer employees grouped together and that he anticipated they would walk off the job as had occurred in the past with new employees. Deal, however, testified that it was the difficult nature of the job, not any unsafe or adverse working conditions, that usually caused new employees unaccustomed to such work to quit midstream, and that this is what caused him to suspect the employees would walk off. As it turned out, these employees, as credibly testified to by Deal, told him they walked off the job because they found the work difficult and lacked experience working in the swamp.

Thus, even if I were to believe that Rice walked off the job to protest what he believed to be unsafe and onerous working conditions at the Dismal Swamp site, there is simply no credible evidence to indicate he did so as part of some agreed-upon group action, or that he was, in some other manner, acting in concert with other employees. While there is no question that other employees also walked off the job, that fact alone, absent a showing that they did so as part of some agreed upon plan, will not support a finding that employees were involved in concerted activity within the meaning of the Act. See, e.g., *Tri-State Truck Service, Inc. v. NLRB*, 616 F.2d 65, 71 (3rd Cir. 1980) (“The mere fact that two employees react similarly...does not lead to the conclusion that they are acting ‘concertedly’ for the purposes of the Act”). Moreover, the reasons given by the four employees who walked off before Rice,

¹⁹ The Third Circuit’s view of “concertedness” was embraced by the Board in *Meyers*, *supra* at 887. See, also, *Daly Park Nursing Home*, 287 NLRB 710, 711 (1987).

according to Deal's testimony, related to their inability to do the work in question, and had nothing to do with Rice's own reason for walking out, e.g., mosquitoes and the hot weather, suggesting that Rice was not acting in concert with them.

5 Nor was Rice engaged in protected activity when he walked off the job. The General Counsel argues that Rice's refusal to continue working on September 3, was motivated by what he considered to be unsafe and adverse working conditions prevailing at the Dismal Swamp jobsite, and that a walkout for such purposes has long been found to be protected under *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In that case, the Supreme Court held that
10 unrepresented employees who walked off the job to protest intolerably cold working conditions were engaged in protected concerted activity within the meaning of the Act.²⁰ If indeed Rice walked off in protest over what he perceived to be unsafe or other adverse conditions, I would have no difficulty finding his activity to be protected under *Washington Aluminum*, supra. The credible evidence of record, however, does not support any such claim.

15 Thus, even if I were to believe that Rice told Deal on September 3, why he was leaving, the reasons proffered by Rice suggest that he walked off for personal reasons and not because of any unsafe or adverse conditions encountered at the jobsite. Thus, by his own account, Rice purportedly walked off because he was bothered by mosquitoes and the hot weather.
20 However, all who testified, including Rice and Rosenberger, admitted that mosquitoes were a constant presence at all worksites and were simply part of the job. As to the weather that day, Rice testified that the temperature was more or less only in the 80's, hardly what one would consider as "oppressive" or "unbearable" heat (Tr. 25, 61), and not even comparable to the "oppressive" 110 degree heat that justified the walkout in *Magic Finishing Company*, supra.²¹
25 Indeed, Rice readily admitted that he had worked in hotter weather before, and there is no indication that he walked off the job on those occasions. In these circumstances, I find that Rice's decision to walk off was motivated by reasons other than the weather or the presence of mosquitoes. Further, the fact that he did not so much as mention safety as a reason for leaving leads me to believe that safety concerns did not factor into his decision.

30 Indeed, one need look no further than Rice's own testimony to reasonably conclude that his reason for leaving work that day was personal in nature and unrelated to safety or some other term or condition of employment. Thus, according to Rice, he told Deal that he would return to work only if assigned to a worksite other than a swamp, making clear that it was his
35 opposition to swamps and not any adverse or unsafe condition encountered at the Dismal Swamp, that provoked his departure. The General Counsel on brief (GCB: 7) suggests that Rice was only expressing his opposition to working at the Dismal Swamp site. However, I find nothing in Rice's alleged remarks to Deal to support that view. In fact, Rice's claim that in 1994, after working his first swamp site, he told Deal he "wasn't cutting any more swamps,"
40 provides clear evidence that Rice had a general aversion to swamps, and lends credence to the Respondent's claim that Rice was simply seeking to avoid swamp work altogether. Indeed,

²⁰ In *Magic Finishing Company*, 323 NLRB No. 28 (1997), cited by the General Counsel (GCB: 22), the Board found that a walkout by employees to protest "unbearable" and
45 "oppressive" heat in the employer's facility was protected under the Act, relying on the Court's *Washington Aluminum* decision.

²¹ Other factors serve to distinguish *Magic Finishing Company* from the instant case. Thus, unlike *Magic Finishing Company*, where the employer was fully aware of the reasons for the employee walkout, here neither Deal nor the Respondent in general knew why Deal chose to walk off. Further, while the walkout in *Magic Finishing Company* involved group action, no such concerted action, as that concept has been defined by the Board, occurred here.

Rice's further alleged remarks to Deal, that he would return only if reassigned to work as a first class timber-cutter or to cut brush on dry land, establishes quite clearly Rice's walkout had nothing to do with safety or conditions at the swamp, but was instead motivated by Rice's aversion to swamps, as well as a desire to limit the type of work the Respondent could assign to him. Thus, by conditioning his return to work on being assigned to only non-swamp jobsites and being allowed to work only as a first class timber cutter, Rice was in effect seeking to pick and choose which work he would do for Respondent and, more importantly, was trying to set his own terms and conditions of employment in defiance of Respondent's authority to determine those matters for itself. In these circumstances, I find that Rice's walkout was not protected by the Act. *Audobon Health Care Center*, 268 NLRB 137 (1983).²² I further find that Rice quit his employment on September 3, for personal reasons, e.g., a dislike of swamp work, and that the Respondent was within its right to refuse to take him back on September 8, when Rice sought reinstatement. In sum, I find that the Respondent's conduct in this regard did not violate Section 8(a)(1) of the Act, as alleged.

Conclusions of Law

1. The Respondent, Scott Service Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party, Thomas Rice, did not engage in any activity protected by the Act when he walked off the Dismal Swamp jobsite on September 3.

²² The evidence also does not support a finding that the conditions at the Dismal Swamp jobsite were "abnormally dangerous" under Section 502. While there is no question that the work in general was hazardous, the record does not establish that the Dismal Swamp jobsite was any more hazardous than Respondent's other jobsites, or that there was some abnormally dangerous condition at the Dismal Swamp which put the employees in imminent peril. See, *Custodis-Cottrell, Inc.*, 283 NLRB 585, 589 (1987).

3. The Respondent did not violate Section 8(a)(1) of the Act when on September 8, it refused to reinstate Rice for walking off the Dismal Swamp jobsite on September 3.

4. The Respondent has not violated Act in any other manner.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

ORDER

10 The complaint is dismissed.

Dated, Washington, D.C.

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George Alemán
Administrative Law Judge

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²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.